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No. 91-869

Supreme Court, U.S.
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In The

Supreme Court of the United States

October Term, 1991

DONAL CAMPBELL,

Petitioner,

v.

LENORA DAUGHERTY,

Respondent.

Petition For Writ Of Certiorari To The United States Court Of Appeals For The Sixth Circuit

SUPPLEMENTAL APPENDIX TO PETITION FOR WRIT OF CERTIORARI

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IN THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF TENNESSEE
NASHVILLE DIVISION

LENORA DAUGHERTY	)	
	)	
Plaintiff	)	No. 3:88-0480
v.	)	Judge Nixon
DONAL CAMPBELL, et al.	)	
	)	
Defendants	)	

REPORT AND RECOMMENDATION

I. INTRODUCTION

This action was referred to the Magistrate by the Honorable John T. Nixon, District Judge, by Order dated November 28, 1988. The Magistrate was directed to determine any pretrial matters arising in this action pursuant to 28 U.S.C. § 636 (b)(1)(A) and (B). Plaintiff Lenora Daugherty (hereinafter "Daugherty") brings this action under 42 U.S.C. § 1983 against the following defendants: Donal Campbell, Warden, Turney Center Correctional Facility (hereinafter "Turney Center"), a state correctional facility; Alton R. Hesson (hereinafter "Hesson"), Assistant Warden for Security at Turney Center; Robert W. Starbuck, administrative sergeant for security; Brenda G. Funderburk, correctional officer; Rita A. Starbuck, a nurse at Turney Center; Kevin W. Daniels, correctional officer, and Bobby L. Chessor, a correctional officer. Daugherty's claims against these defendants arise out of a visual cavity search of her and a search of her vehicle prior to her visit with her husband who is incarcerated at

Turney Center. Daugherty asserts that these searches violated her Fourth Amendment right against unreasonable searches and seizures for which she seeks damages.

The defendant Campbell moves for summary judgment upon the grounds that he is entitled to qualified immunity from this damages suit because Daugherty's alleged Fourth Amendment right was not clearly established at the time of the searches at issue and thus this § 1983 damage action can not be maintained. (See Docket Entry No. 24.) The defendant Campbell also seeks a stay of discovery pending resolution of this motion. The defendant Robert W. Starbuck moves to dismiss or in the alternative for summary judgment stating in essence upon a factual showing that he was not present at Turney Center on the dates in question and thus had no personal involvement in the searches of Daugherty or her vehicle. (See Docket Entry No. 26 and attachments thereto.)

II. ANALYSIS OF THE MOTIONS

A. The Defendant Campbell's Motion

1. Analysis of the Complaint

According to the allegations in her complaint, Daugherty began her visits with her husband, a state inmate at the Turney Center on September 30, 1986 and continued to visit until January 16, 1988. (Docket Entry No. 1, p. 3, ¶ 11.) At some time prior to her planned January 16, 1988 visit, the defendant Campbell allegedly ordered correctional personnel to conduct a search of Daugherty's vehicle and to strip search her person for

possession of narcotics prior to any visit with her husband. When Daugherty arrived on the prison grounds, the defendant Hesson directed that the defendants Funderburk, a correctional officer, and Rita A. Starbuck, a nurse conduct the visual cavity search of Daugherty. Daugherty was ordered to undress and to turn around twice (Id. at p. 6) where she was required to expose herself for a frontal and rear area visual body cavity search.

After the search of Daugherty's person, there was another search of her vehicle. The search of Daugherty's vehicle was requested earlier, but was delayed due to the fact that her keys had been locked in the trunk of her truck. *Id.* at p. 6. After these searches, the defendant Daniels instructed Daugherty to sign a consent form to the searches before she would be permitted to visit her husband.

According to the regulations of the Tennessee Department of Correction, searches of visitors are subject to the following requirements:

> V. POLICY. When there is probable cause to believe that an individual may be concealing in a body orifice contraband that would threaten the security of the institution or its personnel, the Warden/Director, or designated representative, may authorize the manual search of a body cavity. (See Policy #506.06 Searches)
>
> VI. PROCEDURE:
>
> A. Probable Cause for Search
>
> A body cavity search of an inmate/student, visitor, or staff member shall only be

initiated when there is probable cause to believe that the individual has concealed contraband within a body cavity or orifice. Probable cause may be established from the following evidence:

1. Confidential information from a reliable source.

2. Irregularities found in the area of body cavities during an unclothed body search.

3. Observed actions or behavior resulting in reasonable cause to believe that the individual has contraband concealed in a body cavity.

4. Detection of contraband on the person of an inmate/student's visitor after physical contact, and with reasonable cause to believe the visitor's possession of contraband was for the purpose of smuggling it in or out of the institution.

5. Any other reasonable cause to believe that an inmate/student has contraband concealed in a body cavity. (Emphasis added.)

(See Docket Entry No. 37 and attachments thereto.)

2. Conclusions of Law

If a constitutional right were not clearly established at the time of the alleged violation, then the doctrine of qualified immunity constitutes a complete bar to any award of damages and the maintenance of any such action. *Mitchell v. Forsyth*, 472 U.S. 511, 105 S.Ct. 2806, 86

L.Ed.2d 411 (1985). The § 1983 plaintiff who seeks damages must show that the legal right was clearly established *at the time of the violation. Mitchell v. Forsyth, supra.* As the Supreme Court stated in an earlier decision:

> . . . we conclude today that bare allegations of malice should not suffice to subject government officials either to the costs of trial or to the burdens of broad-reaching discovery. We therefore hold that government officials performing discretionary functions generally are shielded from liability for civil damages insofar as their conduct does not violate clearly established statutory or constitutional rights of which a reasonable person would have known. [Citation omitted].
>
> Reliance on the objective reasonableness of an official's conduct, as measured by reference to clearly established law, [footnote omitted] should avoid excessive disruption of government and permit the resolution of many insubstantial claims on summary judgment. On summary judgment, the judge appropriately may determine, not only the currently applicable law, but whether that law was clearly established at the time an action occurred. [footnote omitted]. If the law at that time was not clearly established, an official could not reasonably be expected to anticipate subsequent legal developments, nor could he fairly be said to 'know' that the law forbade conduct not previously identified as unlawful. . . . If the law was clearly established, the immunity defense ordinarily should fail, since a reasonably competent public official should know the law governing his conduct. Nevertheless, if the official pleading the defense claims extraordinary circumstances and

> can prove that he neither knew nor should have known of the relevant legal standard, the defense should be sustained. But again, the defense would turn primarily on objective factors. (Emphasis added.)

Harlow v. Fitzgerald, 457 U.S. 800, 817-19, 73 L.Ed.2d 396, 410-11, 102 S.Ct. 2727 (1982).

The Supreme Court also explained that "[b]ecause they could not reasonably have been expected to be aware of a constitutional right that had not yet been declared, petitioners did not act with such disregard for the established law that their conduct 'cannot be characterized as being in good faith' [citing *Wood v. Strickland*, 420 U.S. at 322, 43 L.Ed.2d 214, 95 S.Ct. 992]." *Procunier v. Navarette*, 434 U.S. at 565, 55 L.Ed.2d at 33, 98 S.Ct. 855.

In determining whether the right at issue was clearly established at the time of the disputed acts, the Court of Appeals for the Sixth Circuit stated that the District Court must look to the decisions of the Supreme Court, Courts of Appeal, and the highest court of the state. *Robinson v. Bibb*, 840 F.2d 349, 351 (6th Cir. 1988), *reh. den., Robinson v. Bibb*, No. 8292 (6th Cir. 1988). In a more recent decision, the Court of Appeals defined the district court's responsibility on qualified immunity as follows:

> Our review of the Supreme Court's decisions and of our own precedent leads us to conclude that, in the ordinary instance, to find a clearly established constitutional right, a district court must find binding precedent by the Supreme Court, its Court of Appeals or itself. In an extraordinary case, it may be possible for the decisions of other courts to clearly establish a principle of law. The decisions of other courts to provide such 'clearly established law' these

> decisions must point unmistakably to the unconstitutionality of the conduct complained of and be so clearly foreshadowed by applicable direct authority as to leave to doubt in the mind of a reasonable officer that his conduct, if challenged on constitutional grounds, would be found wanting. Here a mere handful of decisions of other circuits and district courts, which are admittedly novel, can not form the basis for a clearly established right in this circuit. (Emphasis added.)

Ohio v. Seiter, 858 F.2d 1171, 1177-78 (6th Cir. 1988).

The defendant Campbell cites two decisions in which Courts of Appeals have applied the qualified immunity doctrine to bar an action for an alleged violation of a prison visitor's Fourth Amendment rights because of the lack of probable cause. In those decisions, the courts found that there was no clearly established Fourth Amendment right of prison visitors to be subject to searches upon these prison official's [sic] request. *Thorne v. Jones*, 765 F.2d 1270 (5th Cir. 1985) *cert. den., Jones v. Thorne*, 475 U.S. 1016, 106 S.Ct. 1198, 89 L.Ed.2d 313 (1986) and *Security & Law Enforcement Employees v. Carey*, 737 F.2d 187 (2nd Cir. 1984). However, Daugherty cites several Court of Appeals decisions that recognize a Fourth Amendment right for visitors not to be subjected to searches absent some reasonable suspicion. See *Smothers v. Gibson*, 778 F.2d 470, 473 (8th Cir. 1985); *Blackburn v. Snow*, 771 F.2d 556 (1st Cir. 1985); *Mary Beth G v. City of Chicago*, 723 F.2d 1263, 1273 (7th Cir. 1983); *Doe v. Renfrow*, 631 F.2d 91, 92 (7th Cir. 1980); *United States v. Kallerig*, 534 F.2d 411, 413 (1st Cir. 1976) *cert denied*, 451 U.S. 1022, 101 S.Ct. 3015, 69 L.Ed.2d 395 (1981); *Black v.*

Amico, 387 F.Supp. 88, 91 (W.D. N.Y. 1974). The Magistrate notes that in 1986 this Magistrate found that such a Fourth Amendment right existed for a TDOC prison visitor who was requested to submit to a cavity search. See *Mills v. Norris*, No. 3:86-0005, Order filed April 1, 1986.

It is noteworthy that in *Smothers*, the Court of Appeals observed in a prisoner visitors' Fourth Amendment claim that: "It can not be denied that [the prison visitor] had, in 1981, a 'clearly established fourth amendment right to be free of unreasonable searches.' " *Smothers*, 778 F.2d at 473. Further, in *Blackburn*, the Court observed that: "It can hardly be debated that [a prison visitor] had, in 1977, a 'clearly established' Fourth Amendment right to be free of unreasonable searches. No court has intimated then, as no court has intimated today, that citizens who visit a penal institution forfeit the protections presumptively accorded them by the Bill of Rights. Indeed the Supreme Court has made it clear that no 'iron curtain' separates prisons from the reach of the Constitution." *Blackburn*, 771 F.2d at 569. While there were variations among these decisions in the standard of Fourth Amendment protection, the Court in *Blackburn* observed that the only difference was "to refine the issue of how much suspicion is required." *Id.* at 570. The magistrate also observes that the TDOC regulations at issue appear to reflect the constitutional standards of these cases by requiring a reasonable suspicion and probable cause prior to authorization of a search of a prison visitor. The two decisions, *Thorne* and *Carey*, that are relied upon by the defendant Campbell do not preclude a finding of a clearly established right in January, 1988, the time of the searches at issue. The Magistrate finds that those decisions were back in 1984 and 1985, respectively. Whatever

may have been true in 1984 and 1985 in those circuits about the Fourth Amendment rights asserted here in 1988, it is clear, at least to the Magistrate, that those decisions reaffirmed the existing decisional law in other circuits that there is such a Fourth Amendment right for visitors. Those decisions add characterization that Daugherty's right as a prison visitor to be protected by the Fourth Amendment was clearly established in January, 1988.

Accordingly, the Magistrate concludes that Daugherty had a clearly established right as a prison visitor to be free of any search of her person absent some reasonable suspicion by a prison official.[1]

B. Defendant Robert Starbuck's Motion

The defendant Robert Starbuck has submitted his answers to interrogatories concerning the search of Daugherty in which he stated "I have no direct personal knowledge of the search of plaintiff's person or vehicle because I was not on duty on January 16, 1988. It is my understanding that the body cavity search was conducted by Officer Brenda Funderburk and was witnessed by

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[1] The magistrate notes in this regard that Daugherty does not argue that these TDOC regulations create any liberty interest under the Fourteenth Amendment. Therefore, the Magistrate deems that the probable cause standard set forth in the TDOC regulation is not the legal standard to evaluate the defendant's conduct. Rather, the Fourth Amendment standard is the lesser reasonable suspicion standard that is common to all decisional law under the decisions cited *supra*.

L.P.N. Rita Starbuck. The vehicle search to my understanding was conducted by Lieutenant Bobby Chessor and Corporal Kevin Daniels. I have no knowledge of who signed or authorized the search order." (See Docket Entry No. 27, Exhibit B thereto, p. 4.)

As to the defendant Robert Starbuck's motion for summary judgment, the Magistrate recommends that it be granted. Personal involvement in the alleged constitutional violation is necessary to establish liability. See *Polk County v. Dodson*, 454 U.S. 312, 325, 70 L.Ed.2d 209, 521, 102 S.Ct. 355 (1981); *Bellamy v. Bradley*, 729 F.2d 416, 1401 (6th Cir. 1984).

IV. RECOMMENDATIONS

For the reasons set forth above, the Magistrate recommends that the defendant Campbell's motion for summary judgment be denied, but that the defendant Robert Starbuck's motion summary judgment be granted. Under Rule 72(b) of the Federal Rules of Civil Procedure, any party has ten (10) days from receipt of this Report and Recommendation in which to file any written objections to this Recommendation, with the District Court. Any party opposing said objections shall have ten (10) days from receipt of any objection filed to this Report in which to file any responses to said objections. Failure to file specific objections within ten (10) days of receipt of this Report and Recommendation can constitute a waiver of further appeal of this Recommendation. *Thomas v. Arn*, 474 U.S. 140, 88 L.Ed.2d 435, 106 S.Ct. 466 (1985).

Entered this the 20th day of April, 1989.

/s/ William J. Haynes, Jr.
WILLIAM J. HAYNES, JR.
United States Magistrate

IN THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF TENNESSEE
NASHVILLE DIVISION

LENORA DAUGHERTY	)	
VS.	)	DOCKET NO. 3-88-480
DONAL CAMPBELL	)	

ORDER
(Filed June 15, 1989)

The Court is in receipt of the Report and Recommendation of the Magistrate for the above styled action. The Court ADOPTS the Magistrate's Report and Recommendation pertaining to defendant Starbuck. Thus, the claim against defendant Starbuck is dismissed.

The Court ADOPTS the Report and Recommendation regarding defendant Campbell in respect to the strip search issue. However, the Court respectfully requests that the Magistrate separately address the issue of plaintiff's automobile. Thus, the Court DENIES defendant Campbell's summary judgment motion in respect to the strip search issue and reserves judgment on the automobile search issue pending a report and recommendation by the Magistrate.

Entered this the 14th day of June, 1989.

/s/ John T. Nixon
UNITED STATES
DISTRICT JUDGE